

No. 13490.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROSCOE FOWLER,

Appellant,

vs.

VIMCAR SALES COMPANY, VICTOR M. CARTER and
MORRIS J. HALOPOFF,

Appellees.

APPELLANT'S BRIEF.

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TOPICAL INDEX

	PAGE
Jurisdictional statement	1
Statement of the case.....	2
The disclosure of the patent in suit.....	3
The claims in suit.....	5
The parties defendant.....	6
The prior art.....	9
Count II for unfair competition.....	10
Questions presented	11
Specification of errors.....	12
Summary of argument.....	13
Argument.....	18

I.

The infringement of defendants was willful since they deliberately and knowingly copied plaintiff's hardware in all essential particulars including each and every element of the complete combination set forth in detail in the claims in suit	18
--	----

II.

The plaintiff's invention defined by the claims in suit is a new and meritorious combination of elements, which combination provides adjustment of the door in a different and better way, and exhibits more than the ordinary skill of workers in the art. This is patentable invention under the law	21
A. Plaintiff's new combination is meritorious and amply meets all of the tests of the foregoing cases.....	23
B. Plaintiff's invention is the result of patentable ingenuity clearly rising to the dignity of invention in this crowded art	25

III.

None of the prior art evidence anticipates the claims in suit, which are specific to plaintiff's jamb hardware as shown and described in his patent, nor does said evidence negative invention in plaintiff's jamb hardware, for there is no teaching in any of said art of plaintiff's means for securing his superior results.....	29
A. The prior art patents do not invalidate plaintiff's patent	32
B. The validity of plaintiff's patent has not been affected by the prior uses introduced in evidence by defendants..	37

IV.

The hardware shown in the earlier filed but later issued Fowler-Murphy patent does not anticipate or teach the invention of the Fowler patent here in suit since it has no means to adjust the vertical position of the door without disconnecting the cantilever arm from the door and repositioning it. Furthermore, since said joint patent was co-pending, it is not prior art.....	43
---	----

V.

The copying of plaintiff's hardware by defendants who were then dealers selling plaintiff's hardware, and the substitution of said copies in defendants' line of products in lieu of plaintiff's hardware, without notice to the trade of such substitution, constituted unfair competition with plaintiff because it resulted in confusion of the public and passing off of defendants' hardware as that of plaintiff, the form and appearance of plaintiff's hardware having acquired a secondary meaning indicating plaintiff as the source of said hardware	47
Conclusion	57

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Barbed Wire case, 143 U. S. 275, 36 L. Ed. 158.....	42, 46
Bates v. Coe, 98 U. S. 31.....	32
Bayley & Sons, Inc. v. Brounstein Bros. Co., 246 Fed. 314.....	51
Bianchi v. Barili, 169 F. 2d 793, 78 U. S. P. Q. 5.....	23
Biggs v. Tourtas, 92 Cal. App. 2d 316, 206 P. 2d 871.....	48
Cantrell v. Wallick, 117 U. S. 689.....	23
Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405	29, 30
Eibel Process Company v. Minnesota & Ontario Paper Co., 261 U. S. 45.....	26
Enterprise Mfg. Co. v. Landers, 131 Fed. 240.....	50, 54
Faulkner v. Gibbs, 170 F. 2d 34, 79 U. S. P. Q. 158.....	15, 23, 32
Federal Trade Commission v. Winsted Co., 258 U. S. 483.....	54
Goodyear v. Ray-O-Vac, 321 U. S. 275.....	26
Gulf Smokeless Coal Co. v. Sutton Steel, 35 F. 2d 433.....	37
Holmes v. Atlas Garage Door Co., 54 Fed. Supp. 368, 60 U. S. P. Q. 280.....	31
Hunt Bros. v. Cassidy, 53 Fed. 257.....	36
Ilg Electric Ventilating Co. v. Every-Use Products, Inc., 21 Fed. Supp. 845	55
Johnstone v. Morris, 210 Cal. 580, 282 Pac. 970.....	48
Kirsch Mfg. Co. v. Gould Mersereau Co., Inc., 6 F. 2d 793.....	25
Leeds & Co. v. Victory Talking Mach. Co., 213 U. S. 302.....	21
Luminous Unit Co. v. R. Williamson & Co., 241 Fed. 265; affd., 245 Fed. 988.....	52
McCullough v. Kammerer Corp., 138 F. 2d 482, 59 U. S. P. Q. 263	23, 39
McGill Mfg. Co. v. Leviton Mfg. Co., 43 F. 2d 607.....	54
McPhetridge v. Smith, 101 Cal. App. 122, 281 Pac. 419.....	48
Milbourne Co. v. Davis-Bournonville Co., 270 U. S. 390, 70 L. Ed. 651.....	16, 46
Mohr & Son v. Alliance Securities Co., 14 F. 2d 799.....	37
Nordberg Mfg. Co. v. Woolery Mach. Co., 79 F. 2d 685.....	37
Page v. Mayers, 155 F. 2d 57, 69 U. S. P. Q. 53.....	23

	PAGE
Park-In Theatres, Inc. v. Rogers, et al., 130 F. 2d 745, 55 U. S. P. Q. 103.....	28
Payne Furnace & Supply Co., Inc. v. Williams-Wallace Co., 117 F. 2d 823, 48 U. S. P. Q. 575.....	22
Pointer v. Six Wheel Corp., 177 F. 2d 153, 83 U. S. P. Q. 43....	30
Radio Shack Corp. v. Radio Shack, Inc., 180 F. 2d 200, 84 U. S. P. Q. 410.....	56
Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co., 151 F. 2d 91, 66 U. S. P. Q. 396.....	28
Refrigeration Engineering, Inc. v. York Corp., 168 F. 2d 896, 78 U. S. P. Q. 315.....	23
Rushmore v. Manhattan Screw Co., 163 Fed. 929.....	54
Rymer v. Anchor Stove Co., 70 F. 2d 386.....	53
San Francisco Cornice Co. v. Beyrle, 195 Fed. 516.....	36
Schering Corp. v. Gilbert, 153 F. 2d 428, 68 U. S. P. Q. 84.....	26
Schriber-Schroth v. Cleveland Trust Co., 311 U. S. 211.....	29
Siemon v. Finkle, 190 Cal. 611, 213 Pac. 954.....	48
Socony-Vacuum Oil Co., Inc. v. Rosen, 108 F. 2d 632, 44 U. S. P. Q. 379.....	55
Strong-Scott v. Weller, 112 F. 2d 389.....	39
Suffolk v. Hayden, 70 U. S. 315, 18 L. Ed. 76.....	46
Traitel Co. v. Hungerford Brass, 22 F. 2d 259.....	46
Warner and Co. v. Lilly and Co., 265 U. S. 526.....	54
Webster Loom v. Higgins, 105 U. S. 580.....	22
Wilcox v. Bookwalter, 31 Fed. 224.....	27
Williams v. United Shoe Machinery, 121 F. 2d 273, 50 U. S. P. Q. 264.....	42
Yale & Towne Mfg. Co. v. Alder, 154 Fed. 37.....	50, 54

STATUTES

United States Code, Title 15, Sec. 1121.....	1
United States Code, Title 28, Sec. 1338(a).....	1
United States Code, Title 28, Sec. 1338(b).....	1
United States Code, Title 1126(h).....	1
United States Code, Title 1126(i)	1

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APPELLANT'S BRIEF.

Jurisdictional Statement.

This appeal is from a final judgment of the United States District Court for the Southern District of California, Central Division, dismissing plaintiff-appellant's complaint for patent infringement and unfair competition. The District Court had jurisdiction of the patent infringement count under 28 U. S. C. 1338 (a), and of the unfair competition count under 28 U. S. C. 1338 (b) and also 15 U. S. C. 1121 and 1126 (h) (i). The judgment being final, this Court has jurisdiction under 28 U. S. C. 1291.

The complaint appears at pages 3-8 of the record, and the answer at pages 8-15.

For clarity, the plaintiff-appellant will herein be referred to by name or as plaintiff, and the defendants-appellants by their individual names or as defendants.

Statement of the Case.

The patent in suit is No. 2,516,196 issued to the plaintiff Roscoe Fowler on July 25, 1950 on an application filed by him on November 14, 1949. The patent is entitled Adjustable Overhead Door Hinge and is Exhibit 1 in the book of Exhibits. [R. 353].

The invention of the patent in suit is primarily useful in hanging overhead garage doors, and while the patent is entitled a "hinge," it in fact discloses and claims an entire apparatus for supporting the door from the door jamb so that the door can be swung up from its vertical closed position to a horizontal position inside the garage, leaving the doorway open. Apparatus for mounting doors for movement to an overhead position is generally spoken of in the trade as overhead door hardware. Most commercial overhead hardware falls into one of three categories, referred to in the trade respectively as track, pivot and jamb. [R. 186.]

In track type hardware, the upper edge of the door rides in a track to guide it to overhead position. In pivot type hardware, the door is supported on the side walls of the garage, or on special mounts. In jamb type hardware, the door is mounted directly on the door jambs. These various types of overhead door hardware are recognized in the trade as being of different character or class. [R. 221, 279.]

The door mounting apparatus or hardware of plaintiff's patent in suit is of the jamb type, the details of which will be discussed shortly.

The plaintiff Roscoe Fowler is in the business of manufacturing and selling overhead door hardware under the firm name of Sturdee Steel Products Co., and his hard-

ware is generally known in the trade as Sturdee. The business when purchased by Fowler in 1942, was known as the Sturdee Overhead Door Co. [R. 294], and was manufacturing both pivot and jamb types of hardware.

All of the early jamb hardware suffered from the disadvantage of not being adjustable without re-hanging the door or at least partially dis-assembling the hardware and refastening it to the door. Many and varied solutions have been proposed by numerous workers in the art including the several witnesses who testified in this case. All were seeking a jamb-type hardware which was easy to mount and which could be adjusted after mounting, without detaching it from the door, and which when once adjusted would stay in adjustment.

The plaintiff made various changes in his jamb hardware from time to time and early in 1949 invented and started manufacturing the jamb hardware disclosed and claimed in the patent in suit under the name of Econo-Jamb. Plaintiff is still manufacturing and selling said hardware to the trade as Sturdee Econo-Jamb Hardware.

The Disclosure of the Patent in Suit.

As seen best in Figs. 1 and 2 of the patent drawing [R. 353], the jamb hardware of plaintiff's invention is quite simple. It provides jamb brackets 11 which are bolted to opposite sides of the door jamb 2. Pivotally mounted on each jamb bracket 11 at 11a is a heavy power or master arm 12 which carries the weight of door 1 by having its lower end attached to a side rail 13 on the door. As the master arm 12 is rotated about its pivot 11a, it moves the door from closed to open position. The other end of the master arm 12 has a kicker plate 18 pivotally attached thereto. A strong spring 17 connects the kicker plate to

the lower portion of the door jamb to counter-balance the weight of the door during raising.

The door 1 is positioned in its closed position and guided in its movement by a guide arm or link 14 which is known in the trade as a "cantilever arm." The positioning link 14 is made extendible by forming it of two overlapping link members 14a and 14b, one of which has a pair of slots 14c, the other has correspondingly positioned holes to carry bolts 15 which extend through the slots. The bolts 15 and their corresponding nuts hold the link members tightly together to form a composite reinforced link or cantilever arm. One end of the arm 14 is pivoted on a pin fixedly mounted on the jamb bracket 11, and the other end of the link 14 is pivoted to a bracket 16 fastened to the lower end of the door side rail 13.

From Fig. 1, it is seen that the vertical position of the door when in closed position will be determined by the length of the link or cantilever arm 14. By loosening the bolts 15, the length of link 14 can be readily changed, and then permanently fixed in its new position by cinching up said bolts. This adjustment can be made at any time after the door has been mounted on the jamb.

The construction of link members 14a and b and slots c is very clearly shown in the photos of plaintiff's hardware Exhibits 7, 8 and 9. [R. 361, 363 and 365.]

The foregoing construction is summarized in Finding IX [R. 24, 25] which uses the terminology of the trade, referring to the link 14 as a cantilever arm, and the door bracket 16 as a "gusset plate." With reference to the link 14 or cantilever arm, Finding IX states:

"the cantilever arm being extendible for adjustment,"

The Claims in Suit.

Finding X [R. 25] points out that all of the claims of the patent in suit are limited to an adjustable cantilever arm as follows:

X. "Each of the three claims of Letters Pat. No. 2,516,196 includes as an element a cantilever arm which is adjustable for the purpose of adjusting the door to a vertical position, the means of adjustment being set forth in different phraseology in the three claims but covering essentially the same principle of alleged novelty."

Claim 1 is typical of the three claims of the patent and is set forth in outline form at R. 357. It reads as follows:

1. "A mechanism of the type described for pivotally supporting an overhead door on a door frame, comprising:

(a) a bracket (11) for mounting to the door frame;

(b) a master arm (12) pivotally mounted intermediate the ends thereof to said bracket;

(c) means for pivotally connecting one end of said arm (12) to the door adjacent one edge thereof, said master arm being movable to position an intermediate portion of the door within the door frame;

(d) a link (14) of adjustable length;

(e) a pivot pin pivotally connecting a first end of said link to said bracket at a point fixedly spaced from the pivotal mounting of said arm to said bracket;

(f) means for pivotally connecting the second end of said link to the normally inner side of the door at a point downwardly spaced from the pivotal con-

nection between said arm and door, said link controlling the angular position of said door as it moves with and relative to said arm between open and closed positions;

(g) means (slots 14c and pins 15) for adjusting the length of said link while the aforesaid intermediate portion of the door is within the door frame to thereby cause the door to lie in a vertical plane within the door frame;

(h) and means including a tension spring (17) for interconnecting the free end of said arm and the lower portion of the door frame for applying an upwardly directed force to the door.”

Elements (e), (f), (g) of Claim 1 deal specifically with the extendible link or cantilever arm 14 and recite that its pivotal connection with jamb bracket 11 is fixed and immovable.

The Parties Defendant.

The defendant, Vimcar Sales Company, is a corporation wholly owned, operated and controlled by the defendant Carter [Finding III, R. 23] and operates as a distributor or jobber, buying various hardware products from many manufacturers and reselling them to the trade.

In 1947, and perhaps earlier, Vimcar started selling a jamb-type hardware manufactured by Tavart Co., but in 1949 Vimcar ceased handling said hardware [R. 89] and started purchasing from plaintiff its Econo-Jamb hardware which embodied the invention of the patent in suit. The first purchase of said hardware was July 12, 1949. [R. 88.]

Soon thereafter, in the latter part of 1949 or in January, 1950 [R. 72, 73] Mr. Donner of Vimcar contacted the defendant Halopoff about manufacturing jamb hardware for Vimcar. Donner arranged for Mr. Korse of Vimcar to give to Halopoff a set of plaintiff's hardware [R. 74], which Halopoff took to his shop [R. 75] and noted that it was the same as Sturdee hardware sold by plaintiff [R. 78]. Halopoff then made up a set of the hardware here in suit and showed it to defendant Carter. [R. 79.] The first order was issued to Halopoff by Vimcar on February 7, 1950 to make said hardware for Vimcar. The defendants admitted at the trial [R. 43] that there "isn't any essential difference" between plaintiff's hardware, physical Exhibit 2, and defendants' hardware, physical Exhibit 5, and see paper exhibits 6, 7, 8, 9 [R. 360-366] showing both plaintiff's and defendants' hardware.

By reference to the exhibits [R. 360-366] it is seen that defendants' hardware has the same parts as plaintiff's hardware, namely, a jamb bracket 11, master arm 12, side rail 13, door bracket 16 fast to said side rail, and extendible link (cantilever arm) 14 formed of an upper link 14a provided with slots 14c, and a lower link 14b provided with holes to carry the bolts 15, that the parts are substantially the same size and shape, and that they operate in the same manner as plaintiff's hardware.

Plaintiff in 1949 supplied Vimcar with copies of plaintiff's instruction sheets [R. 367] and a series of photos of the hardware [Exh. 22, A, B, C; R. 389, 390, 391] for Vimcar to use as selling aids. [R. 61.]

The first delivery of the infringing hardware was made by Halopoff to Vimcar on February 15, 1950. [R. 80.] On April 5, 1950, the purchasing agent of Vimcar wrote

to plaintiff [R. 38] asking for half-tone engravings illustrating plaintiff's hardware, stating they were needed for Vimcar's new catalog. Vimcar's last purchase from plaintiff was about April 28, 1950.

After Vimcar stopped buying from plaintiff, Vimcar continued to use the same instruction sheets, making slight modifications thereof [R. 368-373] and using brochures which contained cuts made from the photos previously supplied by plaintiff. [R. 377-378.] The three pictures marked A, B, C on Vimcar brochure [R. 378] are respectively copies of plaintiff's photo Exhibits 22, A, B, C [R. 389, 390, 391]. See also Exhibit 18 [R. 385] which has a cut corresponding to [R. 378A]. The identity between the plaintiff's photos and instruction sheets, and Vimcar's brochure and instruction sheets is covered by Moore's testimony. [R. 54-61.]

Defendants were notified on March 10, 1950 by letters [R. 379, 380] of the pendency of plaintiff's patent application and that the Halopoff hardware, being substantially identical with that of plaintiff, would infringe the patent which plaintiff expected to issue soon on said application.

Defendants did not discontinue making and selling the infringing hardware and on August 7, 1950, their attorneys were notified by letter [R. 382] of the issuance of plaintiff's patent and offering defendants a license thereunder. Defendants did not take a license and this suit was brought on April 5, 1951 to restrain further infringement.

In their answer defendants denied infringement and validity but at the trial did not contest infringement, relying solely on their claim of invalidity of plaintiff's

patent. This defense was upheld by the Court. However, the Court found [Finding XIX, R. 29] that the patent if valid was infringed by defendants. See also Conclusion No. 6 [R. 32], to the same effect.

The Prior Art.

Defendants introduced 17 patents in evidence to show the prior art, Exhibits O, T and U-1-15 [R. 425, 484-553a], of which seven were discussed by their expert witness Coulter, Exhibit T, and six of the patents forming Exhibit U. None of the patents discussed by Coulter shows jamb-type hardware except Exhibit T, which was filed before but issued after the patent in suit. No interference between Exhibit T and the patent in suit was declared by the Patent Office.

Exhibit O is a patent issued to plaintiff on a joint application by plaintiff and one of his employees by the name of Murphy. It covers an earlier development of plaintiff using a jackknife-type cantilever arm and positions the door in the doorway not by adjusting the length of the cantilever arm but by varying its point of attachment to the door. It shows a pin and slot arrangement on one of the jackknife elements to allow use of the hardware on either 7' or 8' doors. This patent is owned by plaintiff.

Defendants produced several competitors of plaintiff who testified as to their various attempts to design practical means to secure adjustability of their hardware. None of these witnesses had made or sold hardware having an extendible cantilever arm. Each of said witnesses had sought to obtain adjustability by providing slots in the jamb bracket or foot bracket for shifting the cantilever pivot pin from one position to another, as for example in the Tavart hardware. The testimony of

Varley, manager of Tavart [R. 269], and four experienced door hangers called as witnesses by plaintiff, was to the effect that the Tavart shiftable pivot pin gets out of adjustment in use, and necessitates re-setting the door from time to time. [R. 276, 278, 279, 281, 284.]

On the basis of the said art, the Trial Court found plaintiff's patent invalid on the grounds of "prior invention, prior public use and for want of invention." The findings are likewise in general terms and do not refer to any particular prior patent or use. See Findings XII, XIV, XV, XVII, XVIII. [R. 27-29.] Finding XIV states that it was old to adjust jamb hardware by adjusting "at the jamb plate," and "at the end of the cantilever arm where it joins the door."

There is no finding by the Court that it was old to provide an extendible cantilever arm or link formed of two overlapping segments which have complemental bolts and slots to allow adjustability of the length of the link to thereby position the door, as shown and claimed in plaintiff's patent, and as made and sold by both plaintiff and defendants.

Count II for Unfair Competition.

This count of plaintiff's complaint was based on the facts heretofore recited, showing identity of plaintiff's and defendants' structures, employment by Vimcar while it was a jobber of plaintiff's of Halopoff to duplicate plaintiff's hardware, use by Vimcar of cuts made from photos furnished by plaintiff while Vimcar was one of plaintiff's

jobbers, and failure by Vimcar to notify the trade that hardware sold by it which was identical with plaintiff's except that it was inferior in quality, was not made by plaintiff. The Trial Court ruled that these acts did not constitute actionable unfair competition.

Questions Presented.

1. Whether defendants who admittedly infringe plaintiff's patent and have copied into their door hardware every essential element of plaintiff's hardware including the extendible cantilever arm and fixed pivots provided by plaintiff for adjusting the vertical position of the door, can escape liability for said infringement by asserting that the claims of plaintiff's patent, which specifically recite plaintiff's entire combination of elements including said extendible cantilever arm and fixed pivots, can nevertheless be rendered invalid by prior devices which do not show the claimed combination, and specifically do not have extendible cantilever arms or fixed pivots, but on the contrary employ other and different means to adjust their doors.

2. Whether it is unfair competition for defendants to copy both the functional and non-functional features of plaintiff's hardware in every essential detail while acting as distributor of plaintiff's products, and to then sell said copies of plaintiff's products in competition with plaintiff, using instruction sheets and brochure cuts copied from plaintiff's instruction sheets and cuts, thereby confusing the public as to the source of said products and enabling defendants to pass off their said copies as products of plaintiff.

Specification of Errors.

1. The Court erred in holding plaintiff's patent invalid on the grounds of prior invention, prior public use and want of invention, and in its Findings XIV, XV, XVII and XVIII in support thereof, since all of the claims in suit recite in detail plaintiff's complete structural combination which is not shown in any of the prior art patents or uses, and no expansion of said claims that might cause them to read on the prior art was necessary or contended for by plaintiff, since infringement of the strict literal wording of said claims was admitted by defendants.

2. The Court erred in Conclusion of Law No. 2 in holding that the co-pending earlier filed but later issued joint patent to plaintiff and his employee Murphy disclosed the inventive combination of the patent in suit, and that said patent was prior art as to the patent in suit.

3. The Court erred in holding, and in Findings XX, XXIV, XXVI, that defendants did not compete unfairly with plaintiff by slavishly copying plaintiff's hardware, and passing off and aiding others to pass off defendants' hardware as that of plaintiff's, and holding that said hardware made by plaintiff and defendants has no non-functional features, when it is obvious that hardware embodying plaintiff's invention can readily be made with an appearance which is not confusingly similar to the hardware made and sold by plaintiff and formerly purchased by defendants from plaintiff and re-sold to the trade.

SUMMARY OF ARGUMENT.

I.

The Infringement of Defendants Was Willful Since They Deliberately and Knowingly Copied Plaintiff's Hardware in All Essential Particulars Including Each and Every Element of the Complete Combination Set Forth in Detail in the Claims in Suit.

The complete appropriation by defendants of plaintiff's hardware in its entirety is clearly shown by Exhibits 7, 8 and 9. [R. 361-366.] The defendant Vimcar was a distributor of plaintiff when the copying was done. The defendant Halopoff had a set of plaintiff's hardware before him when he allegedly designed the infringing hardware.

Even though all of the claims of plaintiff's patent in suit are very limited, reciting in detail each and every element of plaintiff's structure, they are nevertheless admittedly infringed by defendants, and the Court so held. Since the copying was willful and deliberate, plaintiff is entitled to exemplary damages.

II.

The Plaintiff's Invention Defined by the Claims in Suit Is a New and Meritorious Combination of Elements, Which Combination Provides Adjustment of the Door in a Different and Better Way, and Exhibits More Than the Ordinary Skill of Workers in the Art. This Is Patentable Invention Under the Law.

A new combination of old elements is patentable. Plaintiff here has a new combination of old elements, for which he obtained a patent.

Plaintiff does not claim a patent on any *one* of the numerous elements in his claims, but only to the whole combination in its entirety.

A. Plaintiff's Combination Is New and Meritorious and Amply Meets All of the Tests of the Foregoing Cases.

The combination set forth in plaintiff's claims, including the extendible cantilever arm and its fixed pivots is novel. It is also meritorious, as testified to by the general manager of plaintiff's chief competitor, and by four experienced door hangers.

Plaintiff's hardware is simple to adjust and does not come out of adjustment with rough usage. The best evidence of the excellence of plaintiff's hardware is the defendants' deliberate and slavish copying thereof when other types were available to them.

B. Plaintiff's Invention Is the Result of Patentable Ingenuity Clearly Rising to the Dignity of Invention in This Crowded Art.

Plaintiff's new hardware is a real advance in the art. Its simplicity does not detract from its excellence. The cases hold that simplicity alone is not fatal to an invention.

That plaintiff's invention was not obvious is shown by the long failure of others to evolve it.

One of plaintiff's competitors, called as a witness by defendants, testified that "It (plaintiff's hardware) is the best there is, no doubt in my mind about it." [R. 148.]

III.

None of the Prior Art Evidence Anticipates the Claims in Suit, Which Are Specific to Plaintiff's Jamb Hardware as Shown and Described in His Patent, nor Does Said Evidence Negative Invention in Plaintiff's Jamb Hardware, for There Is no Teaching in Any of Said Art of Plaintiff's Means for Securing His Superior Results.

Neither the Trial Court's Minute Order, the Findings or the Conclusions give any hint as to what prior art the Court relied on in holding plaintiff's patent invalid.

The claims of a patent measure the invention, and since none of plaintiff's detailed claims is met by the prior art, it was error to hold them invalid. They are combination claims, and on the authority of *Faulkner v. Gibbs* (C. A. 9), 170 F. 2d 34, affirmed by Supreme Court, and other cases in this Circuit, they are valid.

A. The Prior Art Patents Do Not Invalidate Plaintiff's Patent.

Most of the prior art patents put in evidence relate to *pivot* hardware, as contrasted to *jamb* hardware, and therefore have no relevancy here. Numerous witnesses, including defendants' expert, testified that these two types are different. Their problems are dissimilar. Their structures are dissimilar.

Every patent carries a presumption of validity and the burden is on the one attacking that validity. None of the numerous patents put in evidence as Exhibit U, are any closer than those cited by the Patent Office. Hence, defendants have not sustained their burden.

B. The Validity of Plaintiff's Patent Has Not Been Affected by the Prior Uses Introduced in Evidence by Defendants.

Only the Tavart hardware is at all relevant to the case, and it solves the problem in an entirely different way. Tavart uses a cantilever arm of fixed length and shiftable pivots. Plaintiff on the other hand uses an extendible cantilever arm and fixed pivots. Plaintiff's structure is different from and better than Tavart's. Tavart's hardware gets out of adjustment, plaintiff's does not.

IV.

The Hardware Shown in the Earlier Filed But Later Issued Fowler-Murphy Patent Does Not Anticipate or Teach the Invention of the Fowler Patent Here in Suit Since It Has no Means to Adjust the Vertical Position of the Door Without Disconnecting the Cantilever Arm from the Door and Repositioning It. Furthermore, Since Said Joint Patent Was Co-pending, It Is Not Prior Art.

The Fowler-Murphy patent on its face does not anticipate or teach the present invention. It has a loose cantilever arm like early types of jamb hardware, that is separately attached to the door. Therefore, the problem solved by the patent in suit is not even present in the joint patent.

Since the Fowler-Murphy patent was co-pending with and issued after the patent in suit, it was not prior art. The rule of *Milbourne v. Davis* has no application here.

V.

The Copying of Plaintiff's Hardware by Defendants Who Were Then Dealers Selling Plaintiff's Hardware, and the Substitution of Said Copies in Defendants' Line of Products in Lieu of Plaintiff's Hardware, Without Notice to the Trade of Such Substitution, Constituted Unfair Competition with Plaintiff Because It Resulted in Confusion of the Public and Passing Off of Defendant's Hardware As That of Plaintiff, the Form and Appearance of Plaintiff's Hardware Having Acquired a Secondary Meaning Indicating Plaintiff as the Source of Said Hardware.

The facts are not in dispute as to defendants' copying of both substance and the form of plaintiff's hardware. Defendants copied all the non-functional features along with all the functional ones. Under the cases this is unfair competition.

Defendants' conduct in also copying and using in their literature plaintiff's pictures and cuts is also unfair competition.

These acts resulted in confusion in the trade and palming off of defendants' products as those of plaintiff.

ARGUMENT.

I.

The Infringement of Defendants Was Willful Since They Deliberately and Knowingly Copied Plaintiff's Hardware in All Essential Particulars Including Each and Every Element of the Complete Combination Set Forth in Detail in the Claims in Suit.

The complete appropriation by defendants of plaintiff's hardware in its entirety is readily apparent from an inspection of the sets themselves [Exhs. 2 and 5], and the photographs [Exhs. 7, 8 and 9; R. 361-366]. Shortly after plaintiff's hardware, Exhibit 2, and defendant's hardware, Exhibit 5, had been introduced in evidence, the Court queried counsel for defendants concerning said exhibits as follows [R. 43]:

“The Court: Mr. Beehler, will you come up here and show me where the difference is between the two exhibits? (Exhs. 2 and 5.)

Mr. Beehler: There isn't any essential difference.

The Court: All right.”

Counsel could not of course have responded otherwise, because on their face, the two sets of hardware are practically identical.

The hardware manufactured and sold by the defendants is more than a “Chinese copy” of plaintiff's hardware; it is element by element a complete copy, even down to the dimensions.

Halopoff admitted [R. 74, 75] that he got a set of hardware from Vimcar and found it to be the same as Sturdee (Fowler). There can be no question whatsoever but that at Vimcar's request, Halopoff deliberately copied the Sturdee set of hardware sold by plaintiff to Vimcar.

As seen in the photograph Exhibit 7, [R. 362], defendant's hardware comprises a jamb bracket 11 pivotally mounting a master arm 12 intermediate its ends. One end of this master arm is pivotally connected to the side rail 13. An extendible cantilever arm identical to plaintiff's is pivotally anchored at one end to the jamb bracket while the opposite end of this arm is pivotally connected to the door rail 13. Defendants' cantilever arm, like plaintiffs', is formed of a pair of link members (upper link 14a, lower link 14b). The upper link 14a has a pair of longitudinal slots 14c for receiving bolts to be passed through apertures in the lower link 14b, all as recited in detail in all of the claims.

Defendants' cantilever arm is not only structurally identical to that of the patent in suit, but it is used to accomplish the same function in the same way. As the length of the cantilever arm can be varied, the angular position of the door relative to the master arm may be adjusted to move the door into the desired vertical plane within the door frame.

Plaintiff at the trial showed that the claims of the patent in suit, narrow as they are, read as clearly upon

defendants' hardware as they do upon the hardware shown in the patent. No evidence was introduced by defendants to show non-infringement of the claims of the patent in suit and, in fact, no defense could have been raised by defendants going to non-infringement of the patent.

The voluminous testimony and exhibits introduced by defendants concerning the prior art show conclusively that the art has been for a long time, and now is, very crowded. Overhead door hardware generically is quite old. Most of the advances therein have been minor, but the Patent Office has consistently granted narrow patents on said improvements, strictly limited however to the precise advance made in the art.

This policy was adhered to by the Patent Office in this case, for an inspection of the Fowler claims immediately shows that each of said claims includes all of the operative structure shown in the drawing of the patent. In other words, the patent in suit has only narrow, detailed claims which specifically cover plaintiff's modest advance in the art, and nothing else.

The defendants' appropriation of plaintiff's structure is so complete that defendants' hardware includes each and every element recited in plaintiff's narrow claims and infringes them both in word and spirit. Since said copying by defendants was knowing and deliberate, it is therefore willful, and entitles plaintiff to exemplary damages.

II.

The Plaintiff's Invention Defined by the Claims in
in Suit Is a New and Meritorious Combination of
Elements, Which Combination Provides Adjust-
ment of the Door in a Different and Better Way,
And Exhibits More Than the Ordinary Skill of
Workers in the Art. This Is Patentable Invention
Under the Law.

It is well established that patentable invention may reside entirely in a new combination of old elements when either a novel and useful result is produced by the joint action of the elements, or an old result is provided by the joint action in a more advantageous way.

“A combination is a union of elements, which may be partly old and partly new, or wholly old or wholly new. But, whether new or old, the combination is a means—an invention—distinct from them.”
Leeds & Co. v. Victory Talking Mach. Co., 213 U. S. 302, 318.

In a combination patent, whether the individual elements are separately patentable or unpatentable is immaterial. They may all be old, but together they can form a new and patentable combination. The law looks not at the individual elements of the combination, *but only to the combination as a whole, distinct from its parts.*

Plaintiff does not claim as his invention an adjustable arm *per se*, nor does he claim to be the inventor broadly of an adjustment featuring a pin and slot connection, even though he was the first to use these elements in

jamb hardware to adjust the vertical position of the door. Plaintiff instead claims as his invention a new combination of elements, which combination includes as one element an arm adjustable in length, which co-acts with the other elements to form a unitary means which produces a desired result in a materially better way. The hardware defined in detail by each of the claims in suit *is an entirety*, the integrated parts of which co-act together in a more advantageous way to produce a result long sought by the industry.

In *Webster Loom v. Higgins*, 105 U. S. 580, the Court said:

“It may be laid down as a general rule, though perhaps not an invariable one, that *if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention*. It was, certainly, a new and useful result to make a loom produce fifty yards a day, when it never before had produced more than forty; and we think that the combination of elements by which this was effected, *even if those elements were separately known before*, was invention sufficient to form the basis of a patent.” (Emphasis added.)

The Court of Appeals in this Ninth Circuit has consistently followed the rule laid down by the Supreme Court in *Webster Loom Co. v. Higgins*, *supra*, that a new combination of elements coacting to produce a new result, or an old result in a new and better way, even if those elements were separately known before, is invention.

Payne Furnace & Supply Co., Inc. v. Williams-Wallace Co., 117 F. 2d 823, 48 U. S. P. Q. 575;

Page v. Mayers, 155 F. 2d 57, 69 U. S. P. Q. 53;
Faulkner v. Gibbs, 170 F. 2d 34, 79 U. S. P. Q.
158;

Bianchi v. Barili, 169 F. 2d 793, 78 U. S. P. Q. 5;
Refrigeration Engineering, Inc. v. York Corp.,
168 F. 2d 896, 78 U. S. P. Q. 315;

McCullough v. Kammerer Corp., 138 F. 2d 482,
59 U. S. P. Q. 263.

“New results” of a combination are not limited to a different technical result, but this term, as applied to a combination, includes a better result or a more facile or economical operation. The term has always been used by the Courts in its broad sense.

In *Cantrell v. Wallick*, 117 U. S. 689, the Supreme Court said:

“* * * So a new combination of known devices, whereby the effectiveness of a machine is increased, may be the subject of a patent. *Loom Co. v. Higgins*, 105 U. S. 580; *Hailes v. Van Wormer*, 20 Wall. 353.”

The rule stated in the foregoing cases has become part and parcel of our patent law, and is still the law. It is grounded in equity and logic, and has never been deviated from in principle.

A. Plaintiff's New Combination Is Meritorious and Amply Meets All of the Tests of the Foregoing Cases.

The concept of using in jamb hardware a cantilever arm of adjustable length, together with means for adjusting the length of the arm to obtain the desired adjustment of the door after it is hung is a novel combination.

The evidence clearly shows that the combination specifically defined in detail by each of the claims of the patent in suit contributed to a more facile and efficient adjustment of the door, which adjustment, once made, would not fail even with hard usage. This is clearly a beneficial result within the meaning of the foregoing cases.

The beneficial result obtained by the combination of the claims of the patent in suit is outstanding. The testimony of Bayless [R. 280], Burton [R. 276], Krieger [R. 278], Walizer [R. 284, 285] and Mr. McFadden [R. 148, 149], all experienced door hangers, is uncontradicted as to this fact. They all testified to the excellence and popularity of plaintiff's hardware, and stressed the advantage of its ability to stay in adjustment. They all testified that plaintiff's hardware provided for the first time jamb hardware which was both simple to install and plumb, *which did not fail in use*.

Perhaps the best evidence of the outstanding merit of plaintiff's hardware over others on the market is the admitted fact that defendants' having all of the other types and makes of hardware available to them, chose to and did copy plaintiff's hardware.

That the combination recited in detail in plaintiff's claims is new as well as meritorious is apparent from the fact that there is not one piece of evidence in the whole record, either patents, publications or structure, that shows jamb hardware employing a two-piece extendible

cantilever arm for plumbing the door in the doorway. True, many other devices and methods are shown in the prior art for plumbing overhead doors, but they all accomplish the end result in a different way, and, so the evidence shows, an inferior way.

B. Plaintiff's Invention Is the Result of Patentable Ingenuity Clearly Rising to the Dignity of Invention in This Crowded Art.

The evidence conclusively demonstrates that the combination defined by the claims of the patent in suit was a real and distinct advance in the art and the result of patentable ingenuity. It was far more than the expected skill in the art.

In *Kirsch Mfg. Co. v. Gould Mersereau Co., Inc.*, 6 F. 2d 793, the Circuit Court of Appeals, Second Circuit said:

“An invention is a new display of ingenuity beyond the compass of the routinier, and in the end that is all that can be said about it.”

It has been repeatedly held that simplicity does not negative invention but often shows it. The invention defined by plaintiff's claims here in suit was the result of ingenuity far beyond “the compass of the routinier.” Plaintiff's solution of the problem now appears simple, but this is always true when a development is viewed in hindsight.

As the Supreme Court said in *Goodyear v. Ray-O-Vac*, 321 U. S. 275, 279:

“Viewed after the event, the means Anthony adopted seemed simple and such as should have been obvious to those who worked in the field, *but this is not enough to negative invention.* * * * Once the method was discovered it commended itself to the public as evidenced by marked commercial success.”

That plaintiff's invention was not obvious to those skilled in the art is evidenced by the lapse of time from the introduction of jamb hardware in about 1939 [R. 263] to plaintiff's invention in late 1948 or early 1949. Even after the Tavart hardware in 1945 had shown a partial solution of the problem of door adjustment in jamb hardware, it did not occur to those familiar with the Tavart device that the union of elements making up plaintiff's combination would solve the problem in a materially better way.

The effect of the passage of time after the need and before the invention is many times in and of itself evidence of invention.

See:

Eibel Process Company v. Minnesota & Ontario Paper Co., 261 U. S. 45;

Schering Corp. v. Gilbert, 153 F. 2d 428, (C. C. A. 7) 68 U. S. P. Q. 84.

That plaintiff's invention was the result of patentable ingenuity is further evidenced by the unsuccessful efforts of other workers in the same field to solve the same problem. As stated in *Wilcox v. Bookwalter*, 31 Fed. 224, at 229:

“As Justice Matthews said in *Hollister v. Benedict Manufacturing Co.*, 113 U. S. 73, there must be ‘something more than the expected skill of the calling’, *but when we come to determine what that is, or rather what it was at the date of the alleged invention,—for the standard of that date is the test, we must, if we proceed intelligently, consider what those engaged in that calling were seeking to accomplish, and what they were, by their skill, actually accomplishing.*” (Emphasis added.)

It is clear from the testimony of both plaintiff's and defendants' witnesses that those engaged in the manufacture of overhead door hardware were seeking but failed to evolve a jamb hardware providing satisfactory door adjustment.

The witness McFadden testified that it was not obvious to him and, as to plaintiff's hardware embodying the combination of the patent, he testified—“*It is the best there is, no doubt in my mind about it.*” [R. 148.]

Defendants' witness Winchel testified as to several sets of hardware manufactured by him [Exhs. G, H and I; R. 410-417] but his testimony clearly shows that he and his co-workers long sought but failed to accomplish what plaintiff did accomplish. Even after years of work

in the field, Winchel never found a real solution of the problem solved by plaintiff.

Defendants showed by the witness Matlin that plaintiff's ex-employee Murphy also worked on the problem. But Murphy likewise failed to evolve plaintiff's successful combination, instead producing an entirely different hardware. [Exhs. R, and R-1; R. 480, 481.]

As stated by this Court in *Park-In Theatres, Inc. v. Rogers, et al.*, 130 F. 2d 745, 55 U. S. P. Q. 103, 105:

“The issuance of the patent is presumptive evidence of invention and patentability. The presumption is so strong that in the event of a reasonable doubt as to patentability or invention, that doubt must be resolved in favor of the validity of the patent. (*Mumm v. Decker*, 301 U. S. 168, 171. See, also, *Frank v. Western Electric Co.*, 24 F. 2d 642, 645.)”

This rule was re-stated in *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 151 F. 2d 91, 66 U. S. P. Q. 396, 399, wherein this Court further held that the burden of establishing the invalidity of the claims rested on the appellants (defendants), the Court stating:

“All these claims were for combinations. Appellants alleged, in substance and effect, that these combinations were not new, and that therefore the claims were invalid for lack of novelty. The question thus presented was one of fact. *On this question, appellants had the burden of proof.*” (Emphasis added.)

III.

None of the Prior Art Evidence Anticipates the Claims in Suit, Which Are Specific to Plaintiff's Jamb Hardware as Shown and Described in His Patent, nor Does Said Evidence Negative Invention in Plaintiff's Jamb Hardware, for There Is no Teaching in Any of Said Art of Plaintiff's Means for Securing His Superior Results.

The Trial Court's Minute Order, the Findings, and the Conclusions are all silent as to what prior art the Court relied on in giving judgment for defendants herein.

It is obvious that many of the prior art patents and public uses introduced in evidence are so remote from the subject matter defined by the claims that the Court could not possibly have given that art credence. But where the Court drew the line we cannot tell. Since we do not believe that any of the prior art evidence anticipates or negatives the plaintiff's invention, we are somewhat at a loss as to how to treat the art in this our opening brief.

It has always been held that the claims of a patent measure and define the invention. As was said by the Supreme Court in the famous *Paper Bag* case, *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 419,

“* * * the claims measure the invention. They may be explained and illustrated by the description. They cannot be enlarged by it.”

See also. *Schriber-Schroth v. Cleveland Trust Co.*, 311 U. S. 211, 217.

Since none of the prior patents or uses introduced in evidence by defendants shows or teaches the combination described in the claims in suit, we must conclude that the

Trial Court temporarily lost sight of the foregoing rule stated in the *Paper Bag* case, and held invalid, a much broader claim than appears in the patent.

The cases are legion that the defense of anticipation, *i.e.*, lack of novelty, is established only by proof that the entire combination described by the claims existed as an entirety prior to the patentee's invention thereof. *There is no such proof here.*

Likewise, it is settled law that the defense of want of invention is established only by proof that what the patentee created involved merely the exercise of the mechanical skill expected of those in that particular art. *There is no such proof here.*

The rule has long been established that a combination is novel within the meaning of the patent law *unless the complete combination, i.e., all of its elements, can be found in a single prior description, patent, or structure, in which all the elements do the same work in substantially the same way.*

As said by this Court in *Pointer v. Six Wheel Corp.*, 177 F. 2d 153, 83 U. S. P. Q. 43, 49:

“By the same token, invention cannot be defeated merely by showing that, in one form or another, each element was known or used before.” (Citing cases.)

“*The question is:* Did anyone before think of combining them in this manner in order to achieve the particular unitary result,—a new function? If not, there is invention. *Keystone Mfg. Co. vs. Adams*, 1894, 151 U. S. 139; *Lincoln Engineering*

Co. vs. Stewart-Warner Corp., 1938, 303 U. S. 545, 549 (37 U. S. P. Q. 1, 3).

“At times, the result is accomplished by means which seem simple afterwards. But, *although the improvement be slight, there is invention, unless the means were plainly indicated by the prior art. Parafine Companies v. McEverlast, Inc.*, 1936, C. A. 9, 84 F. 2d 335, 341 (30 U. S. P. Q. 106, 111).”

In *Holmes v. Atlas Garage Door Co.*, 54 Fed. Supp. 368 (60 U. S. P. Q. 280), So. Dist. Calif., Judge Yankwich in holding the Holmes overhead door hardware patent [Exh. U-9; R. 522] valid, said:

“It is a patentable combination which achieves a new and better result not attained by any device in the prior art. *Even if the elements of novelty be, as contended by the defendants, limited to the arcuate slot nut and bolt, in order to achieve flexibility and adjustability, the combination of these elements with the others is patentable invention.* * * * The fact that each of these elements may exist, separately in one form or another, in the prior art does not invalidate the patent in suit.” (Emphasis added.)

Plaintiff's new combination in jamb hardware of a jamb bracket pivotally mounting a power arm intermediate the ends thereof, with means for pivotally connecting one end of the power arm to a garage door through a rail mounted to the door, and *a cantilever arm of variable length* with means for pivotally connecting one end of the cantilever arm to the jamb bracket

a fixed distance from the pivotal connection of the power arm to the bracket, and with the opposite end pivotally connected to the door through the rail, is not shown or described in any printed publication or patent, or embodied in any prior device. As said in *Bates v. Coe*, 98 U. S. 31, 48:

“Where the thing patented is an entirety, consisting of a single device or combination of old elements, incapable of division or separate use, the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire thing is found in one prior patent or printed publication or machine, and another part in another prior exhibit, and still another part in the third one, * * *”

See also, the late case in this Circuit of *Faulkner v. Gibbs*, 170 F. 2d 34, affirmed by the Supreme Court in 338 U. S. 267, where the Gibbs patent for an electrified bingo game was held valid even though all elements of the claims were admittedly old. In sustaining this Court’s previous holding of validity, the Supreme Court said at page 268, “In the instant case the patent has been sustained because of the fact of combination rather than the novelty of any particular element.”

A. The Prior Art Patents Do Not Invalidate Plaintiff’s Patent.

The prior art patents introduced by defendants [Exh. U; R. 489] do not anticipate nor even suggest plaintiff’s combination. Not one of them discloses the union of elements making up the combination set forth in detail in plaintiff’s claims, nor do the prior patents, even when taken together, teach that combination. In fact, most of the patents forming defendants’ Exhibit U, and particularly those relied on at the trial, do not even show jamb-

type hardware. All of the patents discussed by defendants' expert Coulter show *pivot type hardware.* [R. 220.]

Pivot type hardware and jamb hardware are *entirely different types of hardware*, each with their own and different problems. This was confirmed by Varley, general manager of Tavart [R. 274], and the door hangers Krieger [R. 279], Bayless [R. 280], and Walizer [R. 286.] Krieger testified [R. 279]:

“They are two different sets of hardware. They both open the door overhead, but there is no similarity between them.”

Defendants' expert Coulter, *admitted they were different* [R. 221], and a mere casual inspection of the patents *shows that they are different.*

Pivot type hardware comprises generally a pair of supporting arms rigidly interconnected to form a U-shaped wishbone structure which is pivotally mounted at its apex to the side walls of the garage or some supporting structure fastened to the walls.

A representative set of this type of hardware is shown by the Coffey Co. brochure [R. 406] “Easy Pivot Model,” and Patent No. 2,166,898 to Wolf. [Exh. U-5; R. 504.] Referring to the drawing of the Wolf patent, which is typical of the rest, we see that it discloses a pair of door supporting members, each including a pair of diverging arms 3 carried by a casting 6, pivoted at 4 to a support 8 fixed to the side walls of the garage, so that the arms move as a rigid unit from the dotted line position of Fig. 2 of the patent to the solid line showing of the figure.

In pivot type hardware, the arms must be adjusted to accomodate the varying distances between the side

walls of the garage and the adjacent door jambs. This is termed the “offset” adjustment, and the Wolf patent discloses a pivot type hardware in which the arms 3 are adjustable in length to adjust to *varying offsets* such as pictured in Fig. 1 of the drawing of this patent. By forming the arms 3 extendible in length the hardware of the Wolf patent could be used as the supporting means for a door even though the “offset” at opposite sides of the door frame was different. *But this is an entirely different problem from the one solved by plaintiff. In jamb hardware there is no offset problem.*

This *offset* adjustment is also provided in the patents to Holmes, No. 2,228,314 [R. 522], Peck, No. 2,233,638 [R. 527], Violante, No. 2,425,905 [R. 545], and Wread, No. 2,441,742. [R. 550.]

But there is no door adjustment of the type here in issue available in the pivot hardware shown in the Wolf patent and others introduced by the defendants, nor in the Coffey Easy Pivot Model. [R. 406.]

With respect to the Coffey Easy Pivot Model [R. 406], defendants’ expert Coulter testified [R. 195] that it was possible to shift the door “a little bit” by varying the length of the wishbone arms. *What he left unsaid*, is the very obvious fact that this adjustment could *not be accomplished without unfastening the arm brackets from the door, or warping the door out of shape.* Consequently, this hardware is no more pertinent to the issues of this case than is the old style “Standard” loose cantilever arm type hardware made by Halopoff before he started copying plaintiff’s hardware.

With respect to the Wolf patent, Mr. Coulter testified in the affirmative in answer to the question, “Could the door hung by hardware as pictured in the Wolf patent

be adjusted so as to make it vertical in the doorway?" [R. 196.] Again, *what he left unsaid*, was the fact that this *alleged adjustment cannot be accomplished without either disconnecting the arms from the door, or warping the door by brute force and awkwardness to accommodate the change in length and change in angle between the arms and the door.* The failure of Mr. Coulter to state these facts is not surprising however, since as mentioned, a door hung by pivot hardware such as shown in the Wolf patent cannot be adjusted to make it vertical in the doorway by merely lengthening or shortening the arms 3.

Similarly, Mr. Coulter when he testified in respect to the Holmes patent No. 2,228,314 [R. 522] said that loosening the set screws 11 "*allows you to either extend the hardware further to the wall, or either extend the door forward or back or perpendicular, or whatever is necessary.*" [R. 198.] Yes, it "*allows*" adjustment, but only if other things are done. Here again, referring now to Fig. 1 of the drawing of the Holmes patent, if the lower arm was lengthened in an effort to move the bottom of the door out, as in the example above mentioned, the door could not be plumbed, *for again there is no means in Holmes to vary the angle subtended by the upper arm and the inner face of the door.* The same is true of the other pivot type patents.

In no pivot hardware of the prior patents introduced by defendants can a door be plumbed by merely adjusting the length of one or the other or both of the diverging supporting arms of the hardware.

The Holmes patent No. 2,259,819 [R. 536] as well as the Wolf [R. 504] and Wread [R. 550] patents were all considered by the Examiner in the Patent Office during the

prosecution of the application which issued into the patent in suit. The Patent Office considered the claims of plaintiff's patent to be patentable over these prior patents showing *pivot type* hardware, and rightfully so, for those patentees were not confronted with the problem which the plaintiff has so successfully solved in the field of *jamb type* hardware. It is significant that neither the Court's decision nor the findings identifies any of the prior patents as a basis for the decision.

It is axiomatic that every patent carries a presumption of validity from the fact of its issuance. *Hunt Bros. v. Cassidy* (C. C. A. 9), 53 Fed. 257, and the burden of proving invalidity of a patent is on the defendant, *San Francisco Cornice Co. v. Beyrle* (C. C. A. 9), 195 Fed. 516, 518.

The combination claims of the Fowler patent in suit are therefore, as a matter of law, presumptively valid. Defendants have the heavy burden of overcoming this presumption. In attempting to do so, they have presented testimony as to six prior patents showing "pivot type" hardware, which they say overcomes the presumption of validity attached to plaintiff's patent on "jamb hardware." But of these six patents, *three were considered by the Patent Office*, and plaintiff's claims were allowed thereover. These three file wrapper references, Wolf, Holmes and Wread, have no probative value here whatsoever.

It is firmly established that the presumption of validity attaching to a patent from its issuance is so strengthened by the fact that the patents pleaded against it were considered by the Patent Office, as to become an almost un rebuttable presumption. Unless defendants can find art closer to plaintiff's patent than that cited by the Patent

Office, the defendants fail in their attack on the validity of plaintiff's patent.

Mohr & Son v. Alliance Securities Co. (C. C. A. 9), 14 F. 2d 799;

Nordberg Mfg. Co. v. Woolery Mach. Co. (C. C. A. 7), 79 F. 2d 685;

Gulf Smokeless Coal Co. v. Sutton Steel (C. C. A. 4), 35 F. 2d 433.

More important, however, is the fact that no *pivot type* hardware is a good reference against *jamb type* hardware, since the problems are different and the structures are different.

B. The Validity of Plaintiff's Patent Has Not Been Affected by the Prior Uses Introduced in Evidence by Defendants.

Defendants in support of their allegation of invalidity have relied principally on alleged prior use of hardware manufactured by Tavart Company, King Overhead Door Co., and Winchel Manufacturing Co.

The early Tavart hardware appears to embody specifically the disclosure of the *Smith patent* [Exh. T; R. 484], and it is to be noted that the Smith patent, like the patent herein suit, covers a new combination of old elements. As previously mentioned, the Smith and Fowler patents were co-pending without any interference being declared. Obviously, the Patent Office did not consider that there was any conflict between them.

The adjustment of a door with hardware of the Tavart type is brought about by *shifting the location of the pivotal connection of the end of the cantilever arm mounted on the jamb bracket*. The record is replete with testimony showing that this hardware did not provide adjustment without creating new problems for the indus-

try. The inherent defect in the Tavart type hardware resides in the fact that it is impossible to permanently anchor the pivotal connection of the cantilever arm on the jamb bracket by means of a shiftable pin mounted in a slot.

Coulter testified [R. 186, 213, 214] that maximum tolerances of $\frac{1}{8}$ " had to be maintained in hanging doors with jamb hardware. In other words, if the pivot slipped $\frac{1}{8}$ " the door would be too much out of plumb, and would need adjusting.

Varley, manager of Tavart, said [R. 268], "The adjustment is *very critical*. It doesn't take usually an eighth of an inch, or something, to make it work." Thus, we see that Varley confirms Coulter's testimony that if Tavart hardware gets out of adjustment *as little as $\frac{1}{8}$ "*, it must be serviced.

One need not be a professional door hanger to see from a mere casual consideration of the Tavart hardware, that the testimony of Krieger, Walizer and Bayless and of Varley himself, that Tavart hardware often gets out of adjustment, is obviously true, since in the Tavart construction, two mutually exclusive things are attempted. First, *the pivot pin must be shiftable* for adjustment, and second, *it must be rigidly secured* to withstand shock. How can it do both satisfactorily? Obviously, it cannot and does not, when an $\frac{1}{8}$ " slip renders the door inoperative.

The foregoing problems are entirely avoided by the Fowler structure. Fowler has *fixed pivots*, and when his links are cinched up they stay cinched. It is apparent that the principle of the Tavart mechanism is *totally different* from the principle of plaintiff's combination. As

the witness Varley testified [R. 268], plaintiff gets his adjustment in a “different way” from that employed by Tavart.

This fundamental distinction between the Fowler system and the Tavart system is recognized in the Fowler claims which specify that the pivot pin connecting plaintiff’s cantilever arm to the jamb bracket is located at a point “*fixedly spaced*” from the pivot pin of the power arm, *i.e., the claims expressly exclude any hardware wherein the pivot point of the cantilever arm is shiftable as it is in Tavart.* [See Exh. 4, Claim 1, element e.]

All of the defendants were well aware of the Tavart hardware at the time they copied plaintiff’s hardware here in suit. for Vimcar had handled Tavart hardware before it handled plaintiff’s hardware [R. 89]; and *Halopoff had a Tavart set in his shop when he chose a design for Vimcar.* [R. 70.] *Yet he slavishly copied plaintiff’s hardware, taking nothing from the Tavart design.*

The defendants seek to belittle plaintiff’s hardware, but with all of the prior hardware, including Tavart, Winchel, King and Coffey before them, *defendants copied plaintiff’s hardware, element for element.* As so aptly said by the Court of Appeals, Eighth Circuit, in *Strong-Scott v. Weller*, 112 F. 2d 389:

“Efforts of infringers, who professed to think little of the merits of the infringed device over the prior art, *to keep on making and marketing the device as theirs, is the sincerest tribute which they could pay to the patentee.*”

Paraphrasing this Court’s language in *McCullough v. Kammerer Corp.*, 166 F. 2d 759, 76 U. S. P. Q. 503, 513, “it plainly appears that the defendant,” Halopoff,

“busied himself in the work of preserving and promoting his own special brand of free enterprise, by calmly appropriating another man’s original and patented idea.”

The early Winchel hardware [R. 410] is not relevant to the issues here for his cantilever arm, as in the Standard hardware [R. 409], was not connected to the door rail. Whether it also had a horizontal slot in the jamb bracket is immaterial since Fowler has no slot or shiftable pin on his jamb bracket.

The Winchel hardware shown in Exhibit H [R. 414] was, by his own testimony [R. 105], not successful and died aborning. More important, is the fact [R. 122, 123] that this hardware had no means whatsoever for adjusting the door. Its only relevancy, like most of the other prior-use testimony, is to show the long unsuccessful struggle of these experts in the art to try and solve the problem solved by plaintiff.

Winchel’s hardware shown in Exhibit I [R. 417] was similar to his earlier hardware in that the jamb bracket was formed with a horizontal slot. It likewise has nothing to do with this case.

The Winchel hardware shown in the brochure [Exh. J, R. 420, 421] and further illustrated in the photograph [Exh. L, R. 423] *was not proved to be prior to plaintiff’s invention in suit.* Winchel was very hazy as to when this hardware was first built [R. 114] or when it was introduced to the trade. [R. 113.] In answer to several questions [R. 120] he said that the hardware was introduced “around 1948—someplace, the first of 1949, I don’t know just off-hand.”

This kind of vague testimony does not carry the defendants’ heavy burden to show the dates of alleged prior

uses beyond a reasonable doubt. Furthermore, while defendants laid a foundation to bring in other witnesses to clear up Winchel's dates, *no such witnesses were produced*. Winchel testified [R. 112] that his distributors Stevens and Thuet were "the first purchasers" of said hardware. But no one from Stevens and Thuet appeared to clarify Winchel's "guesses" as to the effective dates of his Lo-9 hardware shown in Exhibits J and L.

Furthermore, with these exhibits as with all his others, he didn't know when the exhibit was printed [R. 113]. None of these exhibits was proven, and they are only in evidence to illustrate Winchel's vague and unsupported testimony as to what he did at some uncertain time.

Even if it had been proven that Winchel's Lo-9 hardware [R. 42] was prior to plaintiff's invention, still this hardware did not anticipate or teach the combination of the claims in suit. Plaintiff's claims are drawn *specifically to the particular combination shown in the drawings of plaintiff's patent*. This hardware of Winchel's having a one-piece *inextensible* cantilever arm, and a gusset plate *shiftable* mounted to the door rail, clearly cannot affect the validity of the combination claims of plaintiff's patent built around his *extensible* cantilever mounted on *fixed* pivots. That this Winchel hardware did not adequately solve the problem plaguing the industry is fully shown by the testimony of the witnesses Burton [R. 276], Bayless [R. 280] and Coulter [R. 216].

The hardware [Exh. N] manufactured by King Overhead Door Co. (McFadden) does not anticipate the claims or teach the invention of the patent in suit since the particular union of elements of the patent in suit is not present in this hardware. McFadden's hardware provides some door adjustment in somewhat the same

fashion as Winchel [R. 131], but this does not negative the novelty or invention of plaintiff's different combination defined by the claims of the patent in suit.

Although there was no evidence at all as to exact dates (Matlin's confused testimony) it would appear that somewhere about the time plaintiff introduced his hardware embodying the invention of the patent in suit, a former employee of plaintiff, one Earl Murphy, produced a jamb type hardware using a slotted door rail. This hardware is purported to be shown by the Matlin photographs [R. 480, 481]. However, these photographs clearly show that Murphy's hardware, even if prior to the date of plaintiff's invention, does not disturb the claims of the patent. It was merely a variation of Winchel's Lo-9, no better and probably worse.

The rule that a defendant, particularly an admitted infringer, has a very heavy burden of proof in attacking the validity of a patent, has long been established. As said by the Court in *Williams v. United Shoe Machinery*, C. C. A. 6, 121 F.2d 273, 50 U. S. P. Q. 264,

“* * * One otherwise an infringer who assails the validity of a patent fair on its face bears a heavy burden of persuasion, and fails, unless his evidence has more than a dubious preponderance. *Philippine Sugar Co. v. Philippine Islands*, 247 U. S. 385, 391; *Radio Corp. v. Radio Labs*, 293 U. S. 1, 8.”

The U. S. Supreme Court in the *Barbed Wire* case, 143 U. S. 275, 284, held that novelty can only be negated by proof which puts the fact beyond a “reasonable doubt.” As discussed by the Court in that case, this rule is particularly applicable, where as here, the evidence consists of mere unsupported oral testimony.

IV.

The Hardware Shown in the Earlier Filed But Later Issued Fowler-Murphy Patent Does Not Anticipate or Teach the Invention of the Fowler Patent Here in Suit Since It Has No Means to Adjust the Vertical Position of the Door Without Disconnecting the Cantilever Arm From the Door and Repositioning it. Furthermore, Since Said Joint Patent Was Co-pending, It Is Not Prior Art.

On its face, the joint Fowler-Murphy structure did not, and does not, disclose, teach, or anticipate the Fowler invention as defined by the claims in suit. The Fowler-Murphy joint patent shows a different type of hardware, similar to the old "Standard" and early Winchel varieties.

The patent in suit discloses and claims jamb hardware having a cantilever arm (link 14), one end of which *is connected directly by a pivot pin to the jamb bracket 11*, while the opposite end *is connected to the side rail 13*.

Claim 1 of the patent in suit defines this structural arrangement by the following specific language:

a link of adjustable length;

a pivot pin pivotally connecting a first end of said link to said bracket at a point fixedly spaced from the pivotal mounting of said arm to said bracket; means for pivotally connecting the second end of said link to the normally inner side of the door at a point downwardly spaced from the pivotal connection between said arm and door;

The Fowler-Murphy patent, Exhibit O [R. 425], does not anticipate this claim, or any other claim of the patent in suit, for the simple reason that the cantilever arm 15 of the joint patent is connected, *not to the bracket 11*

as defined by the claims in suit, but to a "positioning lever" 14. The positioning lever 14 is not part of the cantilever arm. The cantilever arm 15 of the joint patent is connected, *not to the side rail 13 as shown in the patent in suit, but to a bracket separate from the side rail 13.*

It is thus obvious that the hardware of the joint patent is entirely different from the hardware here in suit. It does not have the structure called for by the claims in suit, and it does not perform the same work as the structure defined by the claims. Plaintiff is not claiming cantilever arms, *per se*; he is claiming a particular cantilever arm mounted in a particular way to perform a particular function.

The hardware of the Fowler-Murphy patent was developed to provide a closure structure in which certain members were extensible or contractible "to accommodate doors or closures of various lengths or heights." As jamb hardware is actually a mechanism for balancing a door within a doorway, the Court will readily understand that hardware proportioned to balance seven foot doors cannot be used to balance eight foot doors. To solve this problem, Fowler and Murphy tried to devise hardware in which certain members could be extended to handle an eight foot door, and contracted to accommodate a seven foot door.

There is no disclosure in the joint patent of means to push the lower portion of the door out, or pull said

portion in, to adjust the vertical position of the door. In fact, no adjustment of this type was necessary in the hardware of the Fowler and Murphy patent, for the “second end” of its cantilever arm 15 is not attached to the side rail at all, but is anchored to the door at whatever distant point is necessary to locate the door properly within the doorway. In this respect, the hardware of the Fowler-Murphy patent is not different from the very first jamb hardware produced by plaintiff and exemplified in Exhibit 25 [R. 398].

The hardware of the Fowler and Murphy patent is not only different in all major particulars from the hardware of the patent in suit, but the inventive concepts of the two patents are entirely different. Clearly, the joint Fowler-Murphy patent cannot be said to anticipate or teach the invention described in the claims of the patent in suit.

While, as pointed out above, the Fowler-Murphy patent has no relevancy to this case since it does not show or suggest either the problem or the solution thereof described and claimed in the patent in suit, it should also be noted that the Fowler-Murphy patent is not properly part of the prior art and therefore should not have been even considered by the Court.

The general rule is that an inventor by describing but not claiming an invention in a patent granted to him, *upon issuance of the patent*, dedicates the matter described but not claimed therein. The issuance of the patent has no such effect, however, when the matter thus

described but not claimed was the subject of a co-pending application in the Patent Office by him. This was early established and explicitly adjudged in *Suffolk v. Hayden*, 70 U. S. 315, 18 L. Ed. 76 and recognized as sound doctrine in the *Barbed Wire* case, 143 U. S. 275, 36 L. Ed. 158.

The question of dedication cannot be raised here for plaintiff's patent No. 2,523,207, although resulting from an earlier filed application, issued *subsequent* to the patent in suit and was therefore *co-pending therewith*. Even if patent No. 2,523,207 had issued *prior* to the patent in suit, it would not have been fatal to plaintiff so long as the applications were co-pending. As held in *Traitel Co. v. Hungerford Brass*, 22 F. 2d 259 (C. C. A. 2):

“It was not fatal if the invention of the second patent is disclosed in the earlier patent *provided it is not claimed* and the applications for the two patents were *co-pending*.” (Emphasis added.)

The well-known rule of *Milbourne Co. v. Davis-Bournonville Co.*, 270 U. S. 390, 70 L. Ed. 651, 653, that where a device is *fully and completely disclosed* in an earlier filed application, a late inventor cannot claim to be the first inventor of *that particular device*, does not apply here, since the combination defined by the claims in suit is not disclosed or even suggested by the joint Fowler-Murphy patent.

It is apparent therefore that the joint Fowler-Murphy patent [Exh. O] is not material here since (1) it does not show or teach the invention of the patent in suit, and (2) it is not a part of the prior art.

V.

The Copying of Plaintiff's Hardware by Defendants Who Were Then Dealers Selling Plaintiff's Hardware, and the Substitution of Said Copies in Defendants' Line of Products in Lieu of Plaintiff's Hardware, Without Notice to the Trade of Such Substitution, Constituted Unfair Competition With Plaintiff Because It Resulted in Confusion of the Public and Passing Off of Defendants' Hardware as That of Plaintiff, the Form and Appearance of Plaintiff's Hardware Having Acquired a Secondary Meaning Indicating Plaintiff as the Source of Said Hardware.

The undisputed evidence introduced in this cause shows that the defendant Vimcar, in July, 1949, after plaintiff's novel and attractive hardware embodying the invention of the patent in suit had been introduced to the trade, commenced purchasing plaintiff's hardware for resale to its customers. [R. 89.] The evidence further shows that the plaintiff in good faith and in an effort to facilitate sales of this hardware by defendant Vimcar, supplied Vimcar with instruction sheets [R. 367] from which Vimcar had copies made [R. 369, 370], photos [R. 389-392] from which Vimcar made cuts, and other sales aids.

The defendant Carter has admitted that he was not satisfied with the price the plaintiff was charging Vimcar for the hardware [Exh. 20, p. 51] and in late 1949 or very early in 1950 the defendants Vimcar and Carter and employees of Vimcar, conspired with the defendant Halopoff, to produce at a lower cost to Vimcar a substantial duplicate of the hardware then being purchased by Vimcar from plaintiff.

A conspiracy is almost always of necessity provable only by circumstantial evidence since the law recognizes the intrinsic difficulty of establishing a conspiracy by direct evidence; consequently the conspiracy complained of may be inferred from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation and relation of the parties at the time of the commission of the act, and generally all of the circumstances preceding and attending the culmination of the claimed conspiracy. (*Siemon v. Finkle*, 190 Cal. 611, 213 Pac. 954; *Johnstone v. Morris*, 210 Cal. 580, 282 Pac. 970; *McPhetridge v. Smith*, 101 Cal. App. 122, 281 Pac. 419.) This is necessary because it is almost impossible to secure direct evidence of a conspiracy unless, of course, one of the participants has confessed. (*Biggs v. Tourtas*, 92 Cal. App. 2d 316, 206 P. 2d 871.)

The evidence here is sufficient to show that the defendants did conspire to defraud plaintiff, and actually did carry out the conspiracy by the acts complained of, all to the damage of plaintiff.

Plaintiff's hardware, at the time Carter and agents of Vimcar induced Halopoff to copy the same, was well known to the trade as being of plaintiff's manufacture. The defendants, in slavishly copying plaintiff's hardware, *sought to induce the trade to buy that hardware from Vimcar in the belief that they were buying hardware of plaintiff's manufacture.* It must be remembered, as Carter testified, that Vimcar manufactured nothing [Ex. 20, p. 34], and that all products sold by Vimcar, were manufactured by others. Vimcar's customers are experienced purchasers [Exh. 20, p. 34] and were fully aware that products offered by Vimcar were manufac-

tured by others. They looked behind Vimcar to the manufacturer in order to ascertain the quality of the goods bought from Vimcar.

It therefore follows that customers of Vimcar purchasing hardware of plaintiff's manufacture were well aware that said hardware was manufactured by plaintiff and not by Vimcar. Such customers subsequently purchasing from Vimcar identical hardware made by Halopoff would obviously believe that it was of plaintiff's manufacture. Vimcar did not notify its customers that the hardware of the Halopoff manufacture had been substituted by Vimcar for the hardware previously sold of plaintiff's manufacture. Likewise, Vimcar did not apply any mark to the Halopoff hardware to distinguish it from the hardware of plaintiff's manufacture previously sold by Vimcar.

In fact, everything was done that could be done, to conceal the substitution from purchasers. This shows a deliberate attempt to confuse purchasers by the exact duplication of the hardware of plaintiff's manufacture, and to palm off the Halopoff hardware as that of plaintiff. The fact that defendants used the name Olympic did not affect the situation because the customers knew that Vimcar was merely a "distributor" and that its Olympic hardware was made by plaintiff. *It was plaintiff's good name and reputation that the buyers relied on, not the trademark Olympic.*

The cases in all jurisdictions are uniform in holding that passing off one man's goods as the goods of another constitutes unfair competition. This is sometimes referred to as the doctrine of "palming off," and is the backbone of the law of unfair competition.

In the case of trademarks and trade names, the issue is clear,—are the competing names or marks confusingly similar. So also in the usual “dress-of-goods” case, the issue is merely whether the labels, packages or containers are so similar as to confuse the purchaser as to their source. If they are, the defendant is enjoined.

The doctrine of passing-off has also been applied to confusion *in the goods themselves, where a competitor has deliberately copied distinctive or non-functional features* that have come to indicate the goods as of a particular manufacturer. And this is true even where the copier places his own trademark on the goods. The following statement from the landmark case of *Enterprise Mfg. Co. v. Landers* (C. C. A. 2), 131 Fed. 240, 241 stated the rule very well:

“* * * This is a most aggravated case of unfair trading. * * * Here, on the contrary, *they have not only conformed their goods to complainant’s in size and general shape, which was to be expected, but also in all minor details of structure—every line and curve being reproduced, and superfluous metal put into the driving wheels to produce a strikingly characteristic effect* * * * except for the fact that on the one mill is found the complainant’s name, and on the other the defendants’, it would be very difficult to tell them apart. * * *”

So also in the case of *Yale & Towne Mfg. Co. v. Alder* (C. C. A. 2), 154 Fed. 37, 38, the Court in granting an injunction in a case very similar to ours here, said:

“The defendant has with a purpose taken the *design and dress of the plaintiff’s padlock. He has carefully copied it, differentiating his own from it in minor details, probably intending to escape the*

charge of infringement; *but he has gone a step too far* when he has produced a padlock which to casual observation is substantially identical in appearance with the plaintiff's * * *

The factual situation here is well within the rule of the above cases. The situation is further aggravated by the fact that defendant Vimcar, having once sold plaintiff's hardware to customers well aware that Vimcar did not manufacture the hardware, later sold the Halopoff hardware, *using duplicates of plaintiff's mounting instructions, and picturing plaintiff's hardware in its catalogues and other selling aids*, without in any way indicating that its new hardware was manufactured by Halopoff. The sales aids all depict hardware manufactured by the plaintiff and substantially all the pictorial illustrations were made from photographs taken by plaintiff of his hardware and supplied to Vimcar at the latter's request. [R. 54, 57.]

A competitor may not copy "non-functional" features, whether ornamental or not. Stated otherwise, the copying *must be necessary to the functional requirements of the elements, and unless the "form" copied is necessary to "function" it should be enjoined.*

"The defendant's appropriation of this combination, and placing it upon the market, has been unfair and calculated to receive the ordinary purchaser who would not be apt to discover the difference. *His advertising it as his own product, after carefully copying it and differentiating it only under another name, is not sufficient to relieve it of the charge of unfair competition.*"

Bayley & Sons, Inc. v. Brounstein Bros. Co.,
246 Fed. 314 at p. 318 (D. C. N. Y., 1917).

Defendants here have not merely copied the functional elements of plaintiff's hardware, but they have slavishly copied all features, *functional and non-functional* to the extent that even a skilled observer can hardly tell the difference between defendants' hardware and that of plaintiff.

In the case of *Luminous Unit Co. v. R. Williamson & Co.*, 241 Fed. 265 at p. 269 (D. C. N. D. Ill.) (aff'd 245 Fed. 988) (D. C. Ill., 1917), which was a suit for infringement of two patents on electric lighting fixtures, and for unfair competition for copying the non-functional features thereof, the Court said:

“The unique and attractive style of the *Braskolite* indicates origin in the most effective way, but defendant calmly takes it over, and then protests that there is no proof that the public is deceived. That confusion in the minds of dealer and buyer should have resulted *was inevitable*.

* * * * *

“I think it is established by the proof that *defendant did not in good faith use reasonable diligence to avoid deceptive resemblances which might mislead the trade*, and that plaintiff is entitled to injunction and damages.” (Emphasis added.)

The evidence clearly shows that purchasers of hardware have accepted jamb hardware with a two-piece cantilever arm of adjustable length shaped as in plaintiff's hardware as indicating that that hardware is a product manufactured by plaintiff. [R. 288, 278, 280, 285.] It is, therefore, clear that a *secondary meaning* has at-

tached to plaintiff's hardware, and that the appearance of this hardware is now accepted by the trade as indicating plaintiff.

In the case of *Rymer v. Anchor Stove Co.*, 70 F. 2d 386 (C. C. A. 6), the defendant had copied the trade dress of plaintiff's heater and had sold those heaters to Montgomery Ward *who, like the defendant Vimcar, manufactured nothing* and was merely a selling organization. The heaters sold to Montgomery Ward bore no identifying marks to denote that they were manufactured by the defendants. The defendants' explanation was that their mark was omitted merely in compliance with Montgomery Ward's requirements and in pursuance of Ward's universal sales policy.

The Court in holding the defendants guilty of unfair competition said:

"But this will not permit the defendants to escape liability—having assumed the plaintiff's trade dress deliberately, and therefore without doubt intending to profit by the plaintiff's good will, and having in respect to the heaters sold to Montgomery Ward dispensed with the distinguishing marks by which both confusion and liability therefor could be avoided, it put within the power of its customer an opportunity for invading the plaintiff's property right, and the maker has been generally held to responsibility for contributing to the unfair competition which in such cases results. Warner and Co. v. Lilly and Co., 265 U. S. 526." (Emphasis added.)

It is clear from the evidence in this case that Vimcar induced Halopoff to supply Vimcar with the means to

mislead its buyers into purchasing hardware of Halopoff's manufacture as hardware of plaintiff's manufacture. Where the producer and dealer conspire to create this condition, *they are both guilty of consummating a fraud.* (*Federal Trade Commission v. Winsted Co.*, 258 U. S. 483, 494; *Warner and Co. v. Lilly and Co.*, 265 U. S. 526.)

See also the case of *Rushmore v. Manhattan Screw Co.* (C. C. A. 2), 163 Fed. 929, where on the authority of *Enterprise v. Landers*, and *Yale & Towne v. Alder*, the Court of Appeals affirmed an injunction against unfairly competing by copying plaintiff's *automobile head lamps, even though* defendant placed its own trademark on the lamps.

And the case of *McGill Mfg. Co. v. Leviton Mfg. Co.*, 43 F. 2d 607, 608, where in a case for *patent infringement and unfair competition*, based on the manufacture and sale of *electric switches for lighting fixtures*, the Court granted plaintiff an injunction because defendant had copied *non-functional* features of plaintiff's products.

The defendants should not now be heard to cry that plaintiff has no property rights in the trade dress or appearance of his hardware, for with a practically unlimited field of shapes and sizes to select from, and with a relatively wide choice of mechanisms available affording door adjustment, the fact that defendants chose to *copy the exact construction of plaintiff's hardware* is clear evidence that defendants wanted to capitalize on the good will of plaintiff and the high esteem held by the trade for

his hardware, as well as to get the benefits of plaintiff's superior construction.

“* * *, *with the intent to simulate the plaintiff's blower and divert plaintiff's business in blowers to itself*, the defendant began prior to the commencement of this action * * * of blowers *substantially identical in size, shape, ornamentation, and general appearance* to the blowers made and sold by the plaintiff and possessing the characteristics of the *non-functional features* of the plaintiff's blower, including the same external olive green color.

“These acts on the part of the defendant constitute unfair practices in commerce and trade. *The identity or deceptive resemblance* in appearance of the blowers manufactured by the defendant has had the effect of deceiving the public and diverting sales from the plaintiff of its blowers to the defendant, * * *.” (Emphasis added.)

Ilg Electric Ventilating Co. v. Every-Use Products, Inc., 21 Fed. Supp. 845.

The intent to deceive may be presumed from the natural results of the defendants' acts and it is not necessary to prove it by direct evidence. Deception, like a conspiracy, may be inferred from the circumstances and it will be presumed “where the resemblance is patent and the probability of confusion obvious.” (*Socony-Vacuum Oil Co., Inc. v. Rosen*, 108 F. 2d 632, 44 U. S. P. Q. 379.)

In the *Socony-Vacuum* case, the plaintiff had for some time marketed a stick of lubricant which she first placed on the market under a trade name of her choice. Subsequently, plaintiff supplied these sticks to several large

companies for re-sale. The defendant for a time purchased the stick from plaintiff and re-sold in a special package bearing a composite trademark. Defendant then discontinued the purchase of plaintiff's product and commenced manufacture of a substantially identical lubricant stick of the same *dimensions, form, and general appearance as plaintiff's product*. The defendant there, like the defendants Carter and Vimcar here, *did not give notice of the change* to its distributing organization. The Court, affirming the decree of the District Court holding defendant guilty of unfair competition, stated:

“Since the essence of unfair competition consists in palming off, either directly or indirectly, one person's goods as those of another, *the question of intent to deceive is involved though it is not necessary to prove it by direct evidence*. It may be presumed where the resemblance is patent and the probability of confusion is obvious. * * *

“If the simulation of the competitor in the dress of his goods is sufficient to deceive the average purchaser, unfair competition exists even though there are such differences in imitation as would preclude a claim of infringement of a trademark.”

As ruled by the Court in *Radio Shack Corp. v. Radio Shack, Inc.* (C. C. A. 7), 180 F. 2d 200, 84 U. S. P. Q. 410,

“In all cases of unfair competition, principles of old-fashioned honesty are controlling.”

No amount of legal sophistry can explain away defendants' actions which clearly and incontrovertibly constitute unfair competition.

Conclusion.

The patent in suit is admittedly a narrow patent in a crowded art. However, the Patent Office is continuing to grant, and rightly we think, patents to workers in the art for modest improvements which are not in the least earth-shaking in character.

It is such a patent that we have here. The evidence shows that as recently as 1949 the industry was still searching for a really efficient and foolproof means of adjusting the vertical position of overhead doors mounted with jamb-type hardware. Various methods had been tried but it remained for plaintiff to take the last step that spelled complete success.

In retrospect, this last step looks quite simple. In fact it was quite simple. But nevertheless, it had up to then eluded all of the skilled workers in the art.

The Patent Office recognizing the merit and novelty of plaintiff's advance in the art, granted him a patent with three narrow claims specifically restricted to his precise contribution.

The correctness of this action by the Patent Office is now challenged by the defendants who also recognized the merit and novelty of plaintiff's hardware. No one should know these facts any better than defendants who had experience as distributors for both plaintiff and his chief competitor Tavart. On the basis of that experience, the defendants deliberately, knowingly and willingly set out to, and did, infringe plaintiff's patent.

To make matters worse, the defendants copied not only the substance but the form and appearance of plaintiff's products and started selling them in the same channels

of trade which they had previously supplied with plaintiff's products. This is unfair competition.

We have shown that none of the so-called prior art brought into Court by defendants discloses or teaches the combination recited and covered by plaintiff's claims in suit. We have shown that these claims include as specific elements thereof plaintiff's extendible cantilever arm and its fixed pivots. And we have shown that defendants, having available to them various kinds of non-extendible cantilever arms and shiftable pivot connections, nevertheless chose to copy plaintiff's structure, having none of these features.

The equities are clear, and the defendants have not met the heavy burden of proof that must be sustained by anyone, especially a deliberate copier, who seeks to invalidate the actions of the Patent Office.

The judgment below should be reversed, and the case remanded to the Trial Court to receive evidence on the question of damages, with an instruction to the Trial Court to treble the same.

Respectfully submitted,

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